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No. 497

IN THE

Supreme Court of the United States

October Term, 1964

JOHN RUFFALO, JR.,

Petitioner,

v.

MAHONING COUNTY BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issued to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on May 20, 1964, and as to which rehearing was denied on June 24, 1964.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Ohio, printed in Appendix A hereto, p. 33 below, is reported at 176 Ohio St. 263, 199 N.E.2d 396. The opinion of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio is unreported. The relevant portions of the opinion are printed in Appendix A, p. 25 below.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 20, 1964. A timely petition for rehearing, filed June 3, 1964, was denied on June 24, 1964. The judgment is final, and is from the highest court of the state. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since petitioner claims rights, privileges, and immunities under the Constitution and statutes of the United States.

QUESTIONS PRESENTED

1. Does suspension of a lawyer from the practice of law because he has made occasional advances of funds to needy clients in cases under the Federal Employers' Liability Act deny to such lawyer, or the class of clients he represents, rights, privileges, or immunities protected by the Federal Employers' Liability Act or by the Fourteenth Amendment to the Constitution of the United States?

2. Does suspension of a lawyer from the practice of law because he has had in his employ, to assist him in prosecution of cases under the Federal Employers' Liability Act, an investigator who was also employed in a different capacity by a railroad, deny to such lawyer, or the class of clients he represents, rights, privileges, or immunities protected by Section 10 of the Federal Employers' Liability Act or by the Fourteenth Amendment to the Constitution of the United States?

3. Does suspension of a lawyer from the practice of law on the basis of a judicial construction of the canons of ethics which could not fairly have been anticipated deny to such lawyer the right to pursue his calling without due process of law, in contravention of the Four-

teenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 45, § 55: Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

United States Code, Title 45, § 60, ¶ 1: Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be

void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

Rules of Practice of the Supreme Court of Ohio, Rule XXVII(5) (167 Ohio St. lxxviii): Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude.

*Rules of Practice of the Supreme Court of Ohio, Rule XXVIII, § 1 (*167 Ohio St. lxxxiv): These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as provided in Rule XXVII of the Rules of Practice.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association are adopted; and nothing in these rules is intended to

limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. (The Canons of Professional Ethics were adopted, November 13, 1952. The Canons of Judicial Ethics were adopted January 27, 1954.)

Canons of Professional Ethics of the American Bar Association, Canon 10: The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

Canons of Professional Ethics of the American Bar Association, Canon 29: Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

Canons of Professional Ethics of the American Bar Association, Canon 32: No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or

betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

Canons of Professional Ethics of the American Bar Association, Canon 42: A lawyer may not properly agree with the client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

STATEMENT OF THE CASE

Respondent association brought 14 charges of professional misconduct against petitioner. Seven of the charges dealt with solicitation, and the other seven with other forms of alleged misconduct. Extended hearings were held by a three-man panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The panel found, and the Board agreed, that the evidence failed to establish six of the seven charges of solicitation, and it dismissed one other

charge as insufficient in law. The panel, and the board, found the petitioner guilty on one of the charges of solicitation and on six other charges, and recommended his disbarment. The Supreme Court of Ohio, which has responsibility both for determining the facts and for deciding what action should be taken on the basis of those facts, was in disagreement as to whether the facts were as found by the panel and the board on five of the seven charges. It found him guilty of professional misconduct on two of the charges, and ordered his indefinite suspension from the practice of law. Under Rule XXVII (21)-(26) of the Supreme Court of Ohio, an attorney who has been indefinitely suspended may petition for reinstatement after two years have elapsed, and may then be reinstated if he establishes by clear and convincing evidence that he has rehabilitated himself, and that he has the qualifications, mental, educational, and moral, which would have been a requirement of an applicant for admission to the bar at the time of his original admission, and if he successfully passes a bar examination.

As to the two charges on which petitioner was found guilty of misconduct by the Supreme Court of Ohio, charges 8 and 13, there is no factual dispute. In charge 8 it was alleged that petitioner advanced monies to Clara E. Beighley, Naomi Clark, and Sam Cotellesse while handling their claims, and deducted such advances from settlements of their claims. No evidence was adduced with regard to Sam Cotellese and that portion of the charge was stricken by the panel. It is not disputed that petitioner advanced Mrs. Beighley $1025 over a period of four years, and that he advanced Mrs. Clark $711 over a period of three-and-one-half years. These advances were made at various times, beginning some months after these ladies had

retained petitioner, and were made at the request of the clients to pay living expenses. The amount of such advances was deducted from the settlements obtained in these cases, although these clients received other funds, by way of insurance or payments under the Railroad Retirement Act, which would have been sufficient to repay the advances even if nothing had been obtained in settlement of their claims. Both Mrs. Beighley and Mrs. Clark were widows of railroad employees, and their claims were under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. Petitioner testified that he did not offer to advance money to these clients in order to obtain their lawsuits (Tr. 729-734), and there was no evidence to the contrary with regard to this. The Supreme Court of Ohio, overruling to the extent of any inconsistency four prior Ohio decisions, held that these advances violated Canons 10 and 42 of the American Bar Association, which have been adopted by rule in Ohio.

Charge 13 alleged that petitioner conspired with one Michael Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer. It is undisputed that from 1957 until July 19, 1961, Orlando worked for petitioner as an investigator, and that during that period, and until July 21, 1961, he was a "car bleeder" for the Baltimore & Ohio.* Orlando investigated all of petitioner's railroad cases, interviewing witnesses and advising petitioner on technicalities of railroading. Orlando was paid $25 a day and expenses by the petitioner, and, during the more than four years he was

*Although the board and the court below speak of 1962, it is clear that Orlando's employment with petitioner and with the railroad ceased in 1961, as alleged in the complaint and as shown by the undisputed testimony. (Tr. 625.)

employed as an investigator, earned $13,983.62 for such services. Orlando was paid in cash, and only such records of payments as were necessary for the Internal Revenue Service were kept.

On these facts, the Supreme Court of Ohio found that one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar. The Board of Commissioners had held that such conduct violated Canons 29 and 32 of the American Bar Association, but the Supreme Court of Ohio did not indicate which canons, if any, it thought had been violated. The panel, the board, and the court all specifically rejected the contention that § 10 of the Federal Employers' Liability Act, 45 U.S.C. § 60, permitted such employment of Orlando by petitioner.

It was agreed by the parties and by the hearing panel that all legal objections to the charges against petitioner could be raised in the brief to be filed with the panel and the board. Petitioner's claim that to find him guilty on Charge 8 would defeat the policy of the Federal Employers' Liability Act was so asserted in his brief filed with the panel and the board, renewed in his Objections to the Report of the Board filed with the Ohio Supreme Court, and refined, in the light of the intervening decision in *Brotherhood of Railroad Trainmen* v. *Virginia ex rel Virginia State Bar*, 377 U.S. 1 (1964), in his petition for rehearing. Petitioner's constitutional arguments were stated in his Objections to the Report of the Board, and preserved in his motion for rehearing. These federal claims were accepted by a dissenting judge, 176 Ohio St. at 272-275, 199 N.E.2d at 402-404, but rejected sub silentio by the majority of the court. The excerpts from the

record showing raising of these federal claims are set out in Appendix B hereto, p. 51 below.

Petitioner's federal objections to charge 13 were timely asserted before the panel, the board, and the court below, but the parts of the record dealing with this are not reprinted in the appendix since the Supreme Court of Ohio expressly rejected such claims. 176 Ohio St. at 268, 199 N.E.2d at 400.

Question Three of the Questions Presented here, that petitioner has been suspended on the basis of a judicial construction of the canons of ethics which could not fairly have been anticipated, came into the case for the first time when the Supreme Court of Ohio, overruling four of its earlier decisions, gave the relevant canons an interpretation never before adopted by it or any other court. It could, therefore, first have been raised in the petition for rehearing, and was so raised, as set forth in Appendix B hereto, p. 53 below.

REASONS FOR GRANTING THE WRIT

1. *The decision below inhibits enforcement of rights under a federal statute.* This Court need not be told that the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, is a federal statute of importance. Whether railroad employees would be better off under a system of workmen's compensation is not for this Court to decide. Congress has chosen to provide for such employees, and their widows and orphans, a lawsuit rather than an administrative remedy. Whatever springes Ohio may set for those who are endeavoring to assert rights that the state confers, claimants under FELA are not to be prevented from putting forward their claim by local oddities. As Ohio well knows,

"only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952). This principle is specifically applicable to disciplinary actions against lawyers. "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen* v. *Virginia ex rel Virginia State Bar*, 377 U.S. 1, 7 (1964). On this principle it has been held no defense to a stockholders' action to recover short-swing profits that the suit was champertous, for "the public policy of New York cannot nullify this federally created right, established for the effectuation of a broad federal policy." *Magida* v. *Continental Can Co., Inc.*, 231 F.2d 843, 848 (2d Cir. 1956). And a contingent fee contract has been held proper in a Jones Act case even in a state which refuses to permit contingent fees in state-created litigation. *Greenberg* v. *Panama Transport Co.*, 185 F.Supp. 320, 324 (D.Mass. 1960).

The court below held that petitioner was guilty of misconduct in making occasional modest advances to widows, while their FELA claims were pending, for living expenses. It will be seen under Point 2 of this petition that such a holding is contrary to that of every court which has spoken on the question. It will be seen under Point 3 that such a holding is contrary to prior Ohio law. For present purposes, the significance of the holding is that it will prevent impecunious FELA litigants who retain an Ohio attorney from obtaining the fair determination of their cause by a jury which Congress endeavored to guarantee them. It requires

no citation of sociological studies to demonstrate that railroad employees are not ordinarily persons of independent means, that their savings are small, and that they are dependent on their earnings for food, clothing, and shelter. When they are killed or injured, this income stops. Unless they, or their widows, can be advanced money with which to obtain the bare necessities of life, they have no choice but to accept "a quick and cheap settlement" of the sort which was a prominent abuse in the early history of the Act. See *Brotherhood of Railroad Trainmen* v. *Virginia ex rel Virginia State Bar,* 377 U.S. 1, 3 (1964). The penniless cannot afford the luxury of the law's delays, and must take whatever pittance the railroad will offer.

The court below also held that petitioner was guilty of misconduct in employing, during his off hours, a railroad employee to investigate cases, some of which were against the railroad for which the employee worked. Such a holding, if it were permitted to stand, would prevent the effective investigation, and thus the effective prosecution, of FELA suits. Defendants already have a great advantage in the investigation of FELA claims. They have ready access to the witnesses and to the equipment and records involved in the accident, as well as a full understanding of the railroad operations which were being performed. Attorneys for plaintiffs must make their own investigation more circuitously. The only effective investigator for this purpose, as the record shows (Tr. 660-661), is a railroad employee. He understands the business, and he knows the other employees. He is able to obtain statements from witnesses who would be unwilling to give a statement to an outsider. There is not the slightest evidence that Orlando peered into confidential company records, or that he investigated for petitioner during the hours

he was being paid by the railroad, or that he trespassed upon company property. All that is shown is that he voluntarily obtained information for petitioner and gave information to petitioner during his off-hours. It was to permit such conduct that § 10 was added to the Act, 45 U.S.C. § 60, in 1939. The court below thought § 10 inapplicable, since it speaks of "voluntarily" furnishing information. Since Orlando was paid by petitioner, it considered that he was not furnishing the information "voluntarily." 176 Ohio St. at 268, 199 N.E.2d at 400. This argument will not survive the most cursory consideration of the meaning of the word "voluntarily." Certainly there is a distinction between a draftee and a volunteer for the armed forces, though both are paid. Orlando furnished information to petitioner of his own free will, and the statute prohibits any "device"—including a disbarment proceeding—intended to deter him from doing so. Section 10 of the Act was adopted "to protect employees. The intention of the Congress was to see to it that an injured employee could readily obtain all the available information from witnesses, particularly employees of the railroad company." *Dugger v. Baltimore & O. R. Co.*, 5 F.R.D. 334, 336 (E.D.N.Y. 1946). A holding that attorneys for FELA plaintiffs cannot employ railroad men as investigators thwarts that purpose.

Here what Ohio has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. This is not an "ambulance chasing" case. Six of the seven charges of solicitation were dismissed by the panel because they were not supported by the evidence, and the Supreme Court of Ohio, being in disagreement as to the facts, did not pass on the seventh. What Ohio has here sought to halt is the fair

and effective prosecution of FELA claims. As is not uncommon in such cases, "this proceeding was more than an impartial investigation of unethical practices by a bar association with the sole desire to protect the public and the profession. The record indicates that it was an adversary proceeding between the railroads and one of their antagonists." *In re Heirich,* 10 Ill.2d 357, 380, 140 N.E.2d 825, 836 (1956). This proceeding came out of an investigation by the Association of American Railroads (Tr. 771-782), representatives of that Association were outside the courtroom throughout the hearing (Tr. 580), and testimony was offered that one of these representatives told a person he was interviewing "that they were trying to get rid of John Ruffalo and any attorney that had cases against the railroad." (Tr. 611.) The evidence last mentioned was excluded by the panel on the ground that "the American Association of Railroads, Mr. Lynch, and Mr. White are not on trial in this case, and we are not passing on their course of conduct in any way, shape or form." (Tr. 586-587.) Whether that ruling was right, or whether the court below was right in ignoring petitioner's objection that nine of the seventeen members of the Board of Commissioners were members of lawfirms which represent railroads, is not here in issue. But the zeal with which the railroads instigated and investigated this proceeding evidences the importance of the questions here presented to the impartial administration of the Federal Employers' Liability Act. When Congress prohibited, in § 5 of the Act, 45 U.S.C. § 55, any device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from liability under the Act, it wanted that section "to have the full effect that its comprehensive phraseology implies." *Duncan* v. *Thompson,* 315 U.S.

1, 6 (1942); *Boyd* v. *Grand Trunk Western R. Co.*, 338 U.S. 263, 266 (1949). Railroad-sponsored disciplinary action against plaintiffs' attorneys who advance money to clients, so that they need not accept an unjust settlement, and who hire railroad employees so that the facts may be effectively investigated, are a device with far greater potential to defeat liability under the Act than the practices found improper in the cases just cited.

2. *The court below decided a federal constitutional question of importance in a manner probably not in accord with decisions of this Court.* The states have a large measure of freedom in regulating the conduct of lawyers, but "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *National Association for the Advancement of Colored People* v. *Button*, 371 U.S. 415, 439 (1963). "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 239 (1957). For purposes of this rule, there is no constitutional distinction between denial of admission to the bar and disbarment. *Cohen* v. *Hurley*, 366 U.S. 117, 123 (1961).

The grounds on which petitioner is indefinitely suspended from the practice of his profession are arbitrary grounds, bearing no rational connection to his fitness or capacity to practice law. A person is not unfit to practice law because he occasionally advances funds to needy clients. Indeed Resolution 24 of George Hoffman's *Fifty Resolutions in Regard to Personal*

Deportment, written more than a century and a quarter ago and extremely influential in the development of canons of ethics in this country, provides: "Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if I am not, then to induce others to do so." [Reprinted in Drinker, Legal Ethics 338, 343 (1953).] This practice was held by the court below to violate Canon 10 of the Canons of Professional Ethics of the American Bar Association, which have been adopted by rule in Ohio. Canon 10, which prohibits the lawyer from purchasing an interest in his client's claim, is a vestigial remnant of the medieval law against champtery and maintenance. This law, according to a leading historian, is a product of the last flaring up of feudalism, and of the clerical opposition to litigation in the secular courts. Rádin, *Maintenance by Champtery*, 24 Calif.L.Rev. 48, 65-66 (1935). The conditions which gave rise to that law no longer exist. The Ohio Supreme Court, in an opinion overruled by the decision below, has recognized that "the conditions making the ancient rules necessary have substantially disappeared, and new conditions arisen by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in the courts." *Reece* v. *Kyle*, 49 Ohio St. 475, 487, 31 N.E. 747, 751 (1892). Advancing money to clients so that poverty will not bar them from asserting their claim has a purpose similar to that of contingent fee contracts, also denounced in ancient times but now accepted almost everywhere in this country.

The courts have recognized this, and the law with regard to advances to clients for living expenses is clearly developed. It is improper to solicit cases by promises to advance funds. *Fail* v. *Gulf States Steel*

Co., 205 Ala. 148, 87 So. 612 (1920); *State ex rel The Florida Bar v. Dawson*, 111 So.2d 427, 430 (Fla. 1959); *State ex rel Beck* v. *Lush*, 170 Neb. 376, 381, 103 N.W. 2d 136, 139 (1960); *Atchison, T. & S. F. Ry. Co.* v. *Jackson*, 235 F.2d 390, 393 (10th Cir. 1956); *El Janny* v. *Cleveland Tankers, Inc.*, 209 F. Supp. 91, 93 (N.D. Ind. 1962). There, of course, the vice is the solicitation, and the advances are merely the means of solicitation. It has been held also that advances are improper if the client is under no obligation to pay them back if there is no recovery. *State ex rel Nebraska Bar Ass'n* v. *Rein*, 141 Neb. 758, 4 N.W.2d 829 (1942); see *Johnson* v. *Great Northern Ry. Co.*, 128 Minn. 365, 370, 151 N.W. 125, 127 (1915) (dictum); Canon 42, Canons of Professional Ethics of the American Bar Association. *But cf. Reece* v. *Kyle*, 49 Ohio St. 475, 488, 31 N.E. 747, 751 (1892). Beyond this it has been uniformly held that it is neither unethical nor against public policy to make loans for living expenses. The fullest discussions of the point are in *Johnson* v. *Great Northern Ry. Co.*, 128 Minn. 365, 369-370, 151 N.W. 125, 127 (1915), and in *People ex rel Chicago Bar Ass'n* v. *McCallum*, 341 Ill. 578, 589-590, 173 N.E. 827, 831 (1930), but there is much other authority to the same effect: *Hildebrand* v. *State Bar of California*, 18 Cal. 2d 816, 824, 117 P.2d 860, 863-864 (1941); *In re Moore*, 8 Ill.2d 373, 381-382, 134 N.E.2d 324, 328 (1956); *Ryan* v. *Pennsylvania R. Co.*, 268 Ill.App. 364, 375-376 (1932); *In re Sizer*, 306 Mo. 356, 375, 267 S.W. 922, 928 (1924); *Mytton* v. *Missouri Pac. R. Co.*, 211 S.W. 111, 113 (Mo.App. 1919); *Bank of Chenango* v. *Hyde*, 4 Cow. 567 (N.Y. 1825); *cf. Grievance Committee of Fairfield County Bar* v. *Nevas*, 139 Conn. 660, 666-667, 96 A.2d 802, 805 (1963); *In re Randolph*, 347 S.W.2d 91, 92 (Mo. 1961); see *State ex rel The Florida Bar* v.

Dawson, 111 So.2d 427, 430 (Fla. 1959) (dictum); Note, 16 Ohio St.L.J. 114, 116 (1955). These precedents cannot be avoided by saying, as the court below does, that though the advances are in form a loan, in fact there is no reasonable source of repayment other than the proceeds of the claim. The record in the present case shows that Mrs. Beighley collected insurance more than sufficient to repay the advances made to her (Tr. 206), and that when Mrs. Clark asked for advances she was waiting for payments under railroad retirement (Tr. 134-135). Indeed there is evidence in the record that one Elijah Doster was advanced $300 by petitioner—although respondent made no claim that that advance was improper (Tr. 99)—and that he repaid part of the advance before his claim was settled (Tr. 98). It is simply not true to say that the attorney who makes such advances has no source of repayment other than the proceeds of the claim.

To suspend petitioner from the practice of law for making advances to impecunious clients, a practice which until now has been approved by every court which has passed upon it, is an arbitrary and irrational denial of his right to practice law. It is also an interference with the constitutional rights of clients. Even the Virginia Supreme Court of Appeals, which has had to be educated as to other constitutional limitations on its power to regulate professional conduct, held that Chapter 36, § 1(a), of the Virginia Acts of Assembly, 1956 Extra Session, prohibiting persons not having a direct interest in the proceedings from giving anything as an inducement to prosecute an action, was a denial of due process of law to indigent persons who would be barred by such a prohibition from free access to the courts. *National Association for the Advancement*

of Colored People v. *Harrison*, 202 Va. 142, 162-163, 116 S.E.2d 55, 71 (1960).

It is equally arbitrary and irrational to suspend petitioner from his profession because he employed a railroad employee as an investigator. It is improper for an employee to permit outsiders to trespass on the company property to take photographs, *Brotherhood of Railway and Steamship Clerks, etc.* v. *Atlantic Coast Line R. Co.*, 253 F.2d 753 (4th Cir. 1958), or to pay employees for confidential information which the lawyer used for solicitation of cases, *In re Newell*, 174 App.Div. 94, 160 N.Y.Supp. 275 (1916); *In re Noell*, 234 Mo.App. 1162, 96 S.W.2d 213 (1936). Those cases are not this, and there is no case condemning employment of the sort shown by this record. There is no canon prohibiting it. The Board of Commissioners though it violated Canons 29 and 32 of the Canons of Professional Ethics of the American Bar Association, without indicating which of the platitudinous generalities of those two canons it deemed in point. The Supreme Court of Ohio simply said it was wrong, without pointing to any canon or rule of court claimed to have been violated.

This Court has referred to "the undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law * * *." *Cohen* v. *Hurley*, 366 U.S. 117, 122-123 (1961). The decision below is contrary to that premise.

3. *The decision below raises an important question as to the right of lawyers to fair warning of the permissible bounds of conduct.* It is settled here that state penal statutes must give fair notice of what it is that the state commands or forbids. *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *Lanzetta* v.

New Jersey, 306 U.S. 451 (1939); *Musser v. Utah*, 333 U.S. 95 (1948). This requirement is violated by a statute too vague on its face, and it is violated also when a statute, seemingly narrow and precise, is unforeseeably and retroactively expanded by judicial construction. *Bouie* v. *City of Columbia*, 378 U.S. — (1964). For almost a century it has been established that disbarring a lawyer from the practice of his profession is punishment, and that laws having this effect must meet the tests applicable to a penal statute. *Ex parte Garland*, 4 Wall. 333 (1867). This is typically not true, however, of the canons and rules which govern discipline of the bar. "The literal rules or canons are not much help except for obvious cases. There are few judicial decisions. * * * [T]here are few formally expressed and approved guidelines." Schwartz, *Some Thoughts and Questions on Education for Professional Responsibility*, 35 L. A. Bar Bull. 183 (1960). See also Sutton, *Guidelines to Professional Responsibility*, 39 Tex. L.Rev. 391 (1961). Beyond the obvious cases of embezzling a client's funds, blatant solicitation, and conviction for a felony, courts and other disciplinary bodies are in general left free to sit like a kadi under a tree dispensing justice according to individual predilection. The present case is a striking example.

Ohio suffers from no lack of stated standards as to conduct. Rule XXVII(5) of the Ohio Supreme Court Rules defines "misconduct." Rule XXVIII of those rules is entitled "Rules of Professional Conduct." In its first section it adopts by reference the 47 Canons of Professional Ethics and the 36 Canons of Judicial Ethics of the American Bar Association. Seven succeeding sections state seven additional rules to which the lawyer must adhere. Despite this abundance of rules and canons, there was nothing from which peti-

tioner could have fairly expected that the activities for which he has been ordered suspended would be held to constitute professional misconduct.

With regard to the advances to clients condemned in charge 8, until the decision in this case was handed down by the court below on May 20, 1964, an Ohio lawyer could only have thought that such conduct was entirely proper. The decisions in other jurisdictions were uniformly to that effect, as shown under Point 2. The Ohio decisions looked in the same direction. In the leading case of *Reece* v. *Kyle*, 49 Ohio St. 475, 31 N.E. 747 (1892), the Ohio Supreme Court unanimously upheld an assignment to the lawyer by the client of his claim, with the proviso that if the attorney recovered on it, one-half of the proceeds would be paid to the client, and with the further agreement that the attorney would bear the costs and expenses in the first instance and that the client would reimburse him for 50% of such costs and expenses. Such an arrangement smacks far more of purchasing an interest in the claim than does an advance to the client, with the client under an absolute obligation to repay regardless of the result. Yet the Ohio court, in a lengthy discussion, held the arrangement neither illegal nor improper, and spoke forcefully of a professional "duty" to aid the indigent who have been injured, "for in this way many poor people are enabled to obtain justice, where, without such aid they would be remediless." 49 Ohio St. at 486, 31 N.E. at 750. Other Ohio cases built on the same principle, including *Scheinesohn* v. *Lemonek*, 84 Ohio St. 424, 95 N.E. 913 (1911), *Roberts* v. *Montgomery*, 115 Ohio St. 502, 154 N.E. 740 (1926), and *Cleveland Ry. Co.* v. *Godfrey*, 28 Ohio Law Rptr. 466 (Ohio App. 1928). In reaching a contrary result in the present case, the court below noted that these cases were all decided

before the court, in 1952, adopted by rule the Canons of Professional Ethics, and said: "In view of the adoption of those canons, those cases would no longer be applicable to the extent that they are inconsistent with provisions of the canons." 176 Ohio St. at 265, 199 N.E.2d at 398-399. Nothing in the canons gives fair notice that they are changing a well-settled body of Ohio law, or a doctrine fully developed in the cases elsewhere. It is true that Opinion 288 of the Committee on Professional Ethics and Grievances of the American Bar Association, delivered in 1954, and published 41 A.B.A.J. 30 (1955), condemns advances, though under circumstances more aggravated than those present in this case. But it is surprising doctrine that the opinion of a committee of a voluntary bar association, issued after the canons of ethics had been adopted in Ohio, controls over the decisions of the courts of Ohio and of other states. An Ohio commentator, writing subsequent to Opinion 288, did not recognize that such a change had occurred. He wrote: "It should be made clear, however, that the mere loaning of money to a client is not objectionable, per se. * * * The loan is objectionable when used as a means of securing a client." Note, 16 Ohio St. L.J. 114, 116 (1955). The panel which heard the charges against petitioner, men obviously experienced in disciplinary matters, were unfamiliar with Opinion 288, and said that the question of advances to clients "has never come up before, before us" (Tr. 787-788). The holding below that these advances constitute professional misconduct was an unforeseeable and retroactive expansion of the Ohio rules of professional conduct.

The situation is even worse with regard to charge 13, for here there is not even a committee opinion which arguably gave notice, not even a canon which colorably

can be cited as prohibiting the conduct there involved. The court points to no canon or rule to support its holding that "in our opinion" such conduct is wrongful. This is government by the length of the chancellor's foot, rather than government by law.

This is not to say that the canons of ethics can be made as precise as the multiplication tables, nor that there is no room for judicial interpretation of them. The sounder course, the only constitutionally permissible course, is that followed by the Illinois Supreme Court in the case of *In re Brotherhood of Railroad Trainmen,* 13 Ill.2d 391, 398, 150 N.E.2d 163, 168 (1958). The court there held that the regional counsel plan of the brotherhood was improper. An earlier decision by an intermediate appellate court had approved the plan. The Supreme Court said that because of that earlier decision, "proceedings looking toward the imposition of discipline should not be pursued." Insofar as the holdings below are otherwise proper, the court could have announced its understanding as a guide to attorneys in the future. To apply to this petitioner standards of conduct which could not fairly have been anticipated, and to punish him for violating these standards, "is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce* v. *United States,* 314 U.S. 306, 311 (1941). This Court should make it clear that attorneys, like all others, are protected by the Fourteenth Amendment against punishment except for conduct which the state has made clear is forbidden.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES ALAN WRIGHT
71 Larch Road
Cambridge 38, Massachusetts

Attorney for Petitioner

September 10, 1964

APPENDIX A

OPINIONS AND JUDGMENT BELOW

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION OF BOARD OF COMMISSIONERS*

CHARGE NO. 8

It is charged that the Respondent advanced monies to Clara E. Beighley, Naomi Clark, and Sam Cotellesse while handling their claims, and deducted such advances from settlements of their claims. The uncontradicted evidence establishes that Respondent did advance a total of $1,025.00 to Clara Beighley during the period of time that he represented her, and that he advanced $611.00 to Naomi Clark during the time that he represented her. Respondent's representation of each of these parties extended over a period of several years. Respondent admits that these funds were advanced, but justifies the advances on the ground that they were made as an act of kindness at a time when these clients were in difficult circumstances. No evidence was offered to prove any advances to Sam Cotellesse.

The Legal Ethics Committee of the American Bar Association rendered an opinion, Number 288, on October 11, 1954, to the effect that payments, pending trial in personal injury cases, by an attorney to or for

*The full report of the board is a part of the Certified Transcript of Record, on file with this Court. Only those portions of the report dealing with charges 8 and 13, the two charges sustained by the Supreme Court of Ohio, are here reprinted.

the benefit of his injured client, for any purpose other than to cover expenses of litigation subject to reimbursement, are improper. In reaching this conclusion the committee considered Canon 42 which provides:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

The Committee also considered Canon 10 which provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 refers to expenses which are connected with the litigation such as court costs, depositions and similar expenses. It was the committee's opinion that a lawyer who makes advances to his client for other purposes thereby acquires an interest in the subject matter of the litigation which he is conducting in violation of Canon 10. The committee also observed that the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him in addition to the assurance of performing legal services for the client. In other words, such practice can constitute an indirect form of solicitation. The committee observed that the conclusion which it reached is contrary to the conclusion reached by the Supreme Court of Illinois in the case of *State E. R. Chicago Bar Association* v. *McCallum,* 341 Ill. 578, 173 N.E. 827. Three of the judges of the Supreme Court of Illinois dissented from the conclusion of the majority. The question was considered by Judge Beamer of the United States District Court for the North-

ern District of Indiana, Hammond Division, on September 26, 1962, in the case of *El Janny* v. *Cleveland Tankers, Inc.*, 209 F. Supp. 91. Judge Beamer held that a lawyer was not entitled to an order reimbursing him for monies advanced to his client and stated in the opinion:

> "The propriety of the practice of loaning or advancing money to clients in personal injury cases has long been questioned by the courts and the organized bar."

He cited and quoted from Opinion 288 of the Committee of the American Bar Association.

While it may be questioned whether or not an occasional advance or loan by a lawyer to a client constitutes a violation of Canon 10 or Canon 27, it is clear that where such advances are frequently made to various clients over an extended period of time, such practice does establish the violation of Canon 10 in that the lawyer acquires an interest in the subject matter of the litigation which he is conducting, beyond the payment of his fee. Moreover the practice constitutes an indirect form of solicitation in providing an inducement to seek out such lawyers for employment for reasons unrelated to their professional competence. The facts in the present case establish that the Respondent advanced money to Clara Beighley, Naomi Clark and Andrew Masters in various amounts, which according to Respondent's own testimony totaled $2,936.00. It further appears that the practice of Respondent in making such advances was known. One of the witnesses, Elijah Doster, testified that when he contacted Naomi Clark about employing Respondent, Doster told her that the Respondent would lend her money if she needed any. Naomi Clark confirmed this testi-

mony. Andrew Masters testified that the subject of advancing money was discussed with Respondent on the first occasion that Masters visited him.

CONCLUSION

It is, therefore, the conclusion of the Board that the Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27.

CHARGE NO. 13

It is charged that the Respondent conspired with Michael Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer.

The evidence in support of this charge is not in dispute. Orlando worked as an investigator for the Respondent from 1953 to July 19, 1962. During this same period he was also an employee of the Baltimore & Ohio Railroad. He was suspended by the railroad on July 21, 1962 on charges of soliciting claims. A hearing was held on these charges but Orlando did not appear because he says he was in the New Castle Hospital. During his employment with the Respondent, Orlando was paid $25 a day plus expenses and investigated all of the Respondent's railroad cases. He said that he worked an average of ten or fifteen days a month for the Respondent. Withholding slips, Internal Revenue Form 1099, were received in evidence as Relator's Exhibits 7-A, 7-B, 7-C, 7 D and 7-E and showed the following amounts paid to Orlando by the Respondent:

1957	—	$2,950.00
1958	—	1,250.00
1959	—	1,237.37

1960 — 3,829.25
1961 — 4,716.00

According to Orlando, Respondent paid him in cash for which Orlando said he signed receipts. Orlando said that the Respondent kept no records, but paid Orlando on the basis of Orlando's records, but didn't keep these records after his Income Tax returns were filed (R. 641, 654, 655). Respondent stated:

> "We worked on that basis for the particular reason that we didn't want this man to be accused of exactly what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me, like Mr. Guthrie in my office, or anyone else, I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way."

Later Respondent testified that he had no record of payments made to Orlando on his books. He also testified that—

> "* * * as soon as they were examined by the Internal Revenue Department, why, we got rid of them, because we didn't want to keep them, because of the fact we didn't want to involve Mike —" (R. 44).

The Respondent was ordered by a subpoena issued by the Board (Relator's Ex. 8) to produce "all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando of Newcastle, Pa. for the years 1957, 1958, 1959, 1960,

1961 and 1962." Respondent only produced the withholding slips, Form 1099 (Relator's Exhibits 7-A, 7-B, 7-C, 7-D and 7-E above). Respondent was also requested by the Chairman of the Panel to produce all of his records so that counsel for the Relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by Respondent to Orlando (R. 427, 428, 429). The Respondent did not produce his records and refused to comply with the request of the Chairman of the Panel (R. 596, et seq.).

Although the full extent of Orlando's activities in behalf of the Respondent could perhaps be better determined if Respondent had submitted his records for examination as requested by the Chairman of the Panel, there is no dispute about the fact that the Respondent did employ Orlando to investigate cases against the Baltimore & Ohio Railroad while Orlando was working for that railroad. (R. 672, 673.) Furthermore, the Respondent admits that he kept no entries of payments to Orlando so that he would have no record which would disclose the fact that Orlando was employed by the Respondent. The panel questioned the Respondent at length (R. 656, et seq.) on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by that company. He saw nothing wrong with the practice because he was "doing something altogether different from the type of work he was doing on the railroad" (R. 658). But he admitted employing Orlando because of the advantages in having a railroad man working for him (R. 660). He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because "our concepts have changed * * *."

CONCLUSION

The Board does not agree that "our concepts have changed" with respect to the fundamental principle that an agent cannot serve two masters. In 1881 the Supreme Court decided the case of *Bell* v. *McConnell*, 37 O. S. 396. In the Opinion in that case, it is stated (399):

> "In law, as in morals, it may be stated, as a principle, no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Luke 16, 13."

The Board concludes that the statement of this moral and legal principle is as valid today as it was 82 years ago when Bell v. McConnell was decided. See also *2 O. Jur. (2d) 178, Sec. 118,* and *35 O. Jur. (2d) 699, Sec. 78.*

The Board cannot agree with the Respondent's contention that the principle condemning double-agency does not apply because of the difference between Orlando's duties as a railroader from those as an investigator. The fidelity which the employee owes his employer is the same regardless of any distinction which may be made between the nature of the duties he is performing for his employer and those which others may employ him to perform against his employer.

On page 43 of their brief, counsel for Respondent cite Title 45 U.S.C., Sec. 60 which makes it unlawful to attempt to prevent an employee of a common carrier from voluntarily furnishing information to "a person in interest" as to facts incident to the injury or death of any employee. It is contended by counsel that the provisions of this section of the United States Code make the arrangement between Orlando and Respondent a valid and proper one; that if the Board should

hold that the activities of Orlando constitute a basis for discipline of Respondent, such holding would constitute an interference by the State of Ohio with the policy of the Federal law governing the rights of railroad employees under the Act. It is the conclusion of the Board that there is a clear distinction between the action of an employee in "furnishing voluntary information to a person in interest" and those of an employee employed by a lawyer to investigate cases against his employer. There is no provision of the section of the Code which in any way relates to the arrangement which existed between Orlando and the Respondent.

CONCLUSION

It is the conclusion of the Board that the evidence establishes that Respondent was guilty of misconduct in being a party to a transaction which caused Orlando to breach his duty to his employer, and that by reason of such practice the Respondent was guilty of misconduct as stated in the charge and violated Canon 29 and Canon 32 of the Canons of Professional Ethics.

* * *

RECOMMENDATION

It is the recommendation of the Board of Commissioners on Grievances and Discipline that the Respondent be disbarred.

OPINION OF THE SUPREME COURT OF OHIO

MAHONING COUNTY BAR ASSOCIATION *v.* RUFFALO.

Attorneys at law—Misconduct—Disciplinary action—Suspension—Acts warranting.

(D. D. No. 57—Decided May 20, 1964.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The facts are stated in the opinion.

Mr. David C. Haynes and *Mr. Comus M. Beard*, for relator.

Mr. John J. Chester and *Mr. C. Richard Grieser*, for respondent.

Per Curiam. This proceeding was set in motion in 1962 when the Mahoning County Bar Association filed its written complaint with the Board of Commissioners on Grievances and Discipline, charging John Ruffalo, Jr., an attorney at law of the city of Youngstown admitted to the Bar of Ohio in 1946, with unprofessional and unethical conduct in violation of the Canons of Professional Ethics.

The complaint, consisting of 14 charges, was referred to a three-member hearing panel for the taking of evidence and for report. Upon hearing, the panel concluded that charges numbered 3, 8, 9, 10, 11, 12 and 13 had been proved, and that respondent had violated Canons 10, 27, 29 and 32 of the Canons of Professional Ethics. Based on the findings and conclusions of the

panel and the record, the board recommended that respondent be disbarred.

As stated in paragraph five of the syllabus in *In re Lieberman* (1955), 163 Ohio St., 35, 125 N.E. (2d), 328, "the degree of proof required in a disbarment proceeding is a preponderance of the evidence." To the same effect see the *per curiam* opinion in *Cleveland Bar Association* v. *Fleck* (1961), 172 Ohio St., 467, 469, 178 N.E. (2d), 782.

In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts.

As to charge No. 8, it is stated in respondent's brief:

> "The facts * * * which are alleged in this charge are that respondent 'did advance monies to certain clients * * * while their claims were pending, which advances were deducted from any settlements * * * later received the settlement of said claims.' Those facts do not * * * constitute misconduct * * *.
>
> "* * *
>
> "The record shows that respondent did advance monies to certain clients, but with the understanding that such monies were to be repaid irrespective of the outcome of the pending litigation. * * *
>
> "A loan is not a purchase. So long as there is an agreement that the money is a debt and is to be repaid irrespective of the outcome of the case, it is nonsense to claim that the loan or advance amounts to the *purchase* of an interest in the litigation. Indeed, a contingent fee contract with an assignment to the lawyer (the recovery of which

is wholly dependent upon the outcome) comes much closer to the prohibition in this canon [No. 10] than the simple loan or advancement of money. Yet such a fee contract is perfectly valid in the state of Ohio and has been upheld by the courts of Ohio in litigation involving lawyers' claims based upon such contracts. *Roberts* v. *Montgomery*, 115 Ohio St., 502, *Scheinesohn* v. *Lemonek*, 84 Ohio St., 424, and *Cleveland Ry. Co. v. Godfrey*, 28 O. L. R., 466 * * *." But cf. Canon 13.

Canon 10 provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 reads:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement."

It is clear that the word "expenses" appearing after the semicolon refers to "expenses of litigation." It would not include advances of the kind admittedly made by respondent for "living expenses * * * during the period between the filing of and the trial or disposal of the case." See opinion No. 288 of the Legal Ethics Committee of the American Bar Association, 41 A. B. A. Journal, 33, issue of January 1955. We cannot reconcile the majority opinion in *People, ex rel. Chicago Bar Association*, v. *McCallum* (1930), 341 Ill., 578, 173 N.E., 827, on this question with Canons 10 and 42.

It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement

by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The canons contemplate that this will be proper only where the advance is for "expenses of litigation."

It may be observed that the cases of *Roberts* v. *Montgomery, supra* (115 Ohio St., 502), *Scheinesohn* v. *Lemonek, supra* (84 Ohio St., 424), *Cleveland Ry. Co. v. Godfrey, supra* (28 O. L. R., 466), and *Reece* v. *Kyle* (1892), 49 Ohio St., 475, were all decided before this court adopted by the rule the Canons of Professional Ethics. In view of the adoption of those canons, those cases would no longer be applicable to the extent that they are inconsistent with provisions of the canons.

As to charge No. 13, the report of the board summarizes the evidence and facts as follows:

> "It is charged that the respondent conspired with * * * Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer.
>
> "The evidence in support of this charge is not in dispute. Orlando worked as an investigator for the respondent from 1953 to July 19, 1962. During this same period he was also an employee of the Baltimore & Ohio Railroad. He was suspended by the railroad on July 21, 1962, on charges of soliciting claims. A hearing was held on these charges but Orlando did not appear because he says he was in the New Castle Hospital. During his employment with the respondent, Orlando was paid $25 a day plus expenses and investigated all of the respondent's railroad cases. He said that he worked an average of ten or fifteen days a month

for the respondent. Withholding slips, internal revenue form 1099, were received in evidence * * * and showed the following amounts paid to Orlando by the respondent:

"1957	—	$2,950.00
"1958	—	1,250.00
"1959	—	1,237.37
"1960	—	3,829.25
"1961	—	4,716.00

"According to Orlando, respondent paid him in cash for which Orlando said he signed receipts. Orlando said that the respondent kept no records, but paid Orlando on the basis of Orlando's records, but didn't keep these records after his income tax returns were filed * * *. Respondent stated:

"'We worked on that basis for the particular reason that we didn't want this man to be accused of exactly what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me * * * I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way.'

"Later respondent testified that he had no record of payments made to Orlando on his books. He also testified that—

"'* * * as soon as they were examined by the Internal Revenue Department, why, we got rid of them, because we didn't want to keep them, because of the fact we didn't want to involve Mike—' * * *.

"The respondent was ordered by a subpoena issued by the board * * * to produce 'all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando * * * for the years 1957, 1958, 1959, 1960, 1961, and 1962.' Respondent only produced the withholding slips * * *. Respondent was also requested by the chairman of the panel to produce all of his records so that counsel for the relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by respondent to Orlando * * *. The respondent did not produce his records and refused to comply with the request of the chairman of the panel * * *.

"Although the full extent of Orlando's activities in behalf of the respondent could perhaps be better determined if respondent had submitted his records for examination as requested by the chairman of the panel, there is no dispute about the fact that the respondent did employ Orlando to investigate cases against the Baltimore & Ohio Railroad while Orlando was working for that railroad * * *. Furthermore, the respondent admits that he kept no entries of payments to Orlando so that he would have no record which would disclose the fact that Orlando was employed by the respondent. The panel questioned the respondents at length * * * on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by the company. He saw nothing wrong with the practice because he was 'doing something altogether different from the type of work he was doing on the railroad' * * *. But he admitted employing Orlando because of the advantages in having a railroad man working for him * * *. He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because 'our concepts have changed * * *.'"

With respect to this summarization, respondent's brief in this court states:

> "As stated by the board, there is no dispute in the evidence with respect to the foregoing charge. The board does indulge in some innuendos, but the facts relevant to this charge are, simply stated, these: Respondent did hire Michael Orlando to investigate lawsuits for him, and some of those lawsuits involved claims against the Baltimore & Ohio Railroad Company. During this time * * * Orlando was an employee of the Baltimore & Ohio Railroad Company, but engaged in train service, that is, the service of a working railroad brakeman. While we do not consider it material, respondent did frankly testify that he kept no entries of payments to Orlando and that payments were made in cash."

Respondent contends that his employment of Orlando to work against the interests of Orlando's employer, B. & O., was proper by reason of the provisions of Section 60, Title 45, U. S. Code, which reads in part:

> "Any contract, rule, regulation, or device whatsoever * * * to prevent employees of any common carrier from furnishing *voluntarily* information * * * as to the facts incident to the injury or death of any employee, shall be void, and whoever * * * shall attempt to prevent any person from furnishing *voluntarily* such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing *voluntarily* such information to a person in interest, shall, upon conviction * * * be punished * * *." (Emphasis added.)

Obviously this statute would have no application to the instant case. Orlando did not "voluntarily" furnish information. He was paid by defendant to get information.

Respondent's employment of Orlando to work against the interests of his employer, B. & O., so as to benefit respondent and his clients was not an isolated instance. What records respondent was able to produce indicated substantial payments to Orlando in each of five years.

The payment of $4,716 in 1961 was all for work done prior to July 19 of that year.

Respondent now argues that there was nothing wrong with respondent's paying Orlando substantial sums of money to work against the interests of his employer, B. & O., so as to benefit respondent and his clients.

If the respondent did not know that it was wrong to do this, why did he try to cover it up? His testimony that he did this to protect Orlando from charges being made by B. & O. is not convincing testimony that he did not know that this employment of Orlando was wrong.

Why did respondent not produce records to show what the payments were for? The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis that they were no longer needed to sustain their income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando. Their 1961 income tax returns could not have been filed before January 1962 and were not due until April 1962. In July 1962, B. & O. charged Orlando with soliciting cases against it for Ruffalo. In September 1963, Ruffalo was charged with employing Orlando to solicit cases for him. Ruffalo undoubtedly knew that such charges were being prepared and investigated long

before that time. It is difficult to believe that the 1961 federal income tax returns of either Orlando or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any records showing either of them to be innocent of charges of soliciting would be helpful to both. It is almost impossible to reach any reasonable conclusion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B. & O. and against Ruffalo in the proceedings brought against him.

In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar. He is even less qualified if he does so, when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so.

This is not the first time that respondent's conduct as a member of the bar has been questioned and found improper. After he was found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people" and was disciplined therefor in 1957, he showed a contempt for the court, which made that finding and provided a very lenient discipline for his misconduct. Although he admittedly was well able to pay the costs amounting to several hundreds of dollars and had been ordered by that court to "pay the costs of this proceeding within 30 days," he neglected to make any effort to pay them until shortly before the first hearings in these proceedings more than five years later.

The members of this court are not in agreement as to whether the facts are as the board of commissioners recommended they should be found with respect to some of the other charges against respondent. However, in view of the admitted facts with regard to charges 8 and 13 and the previous judgment of 1957 and the attitude of respondent with respect thereto, we are of the opinion that respondent should be suspended for an indefinite period from the practice of law.

Judgment accordingly.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL AND KERNS, JJ., concur.

GIBSON, J., concurs in the judgment.

HERBERT, J., dissents.

KERNS, J., of the Second Appellate District, sitting by designation in the place and stead of GRIFFITH, J.

GIBSON, J., concurring. In view of the respondent's right to apply for reinstatement after the passage of two years following the order of suspension, I concur in the judgment of the court. Paragraph 21, Rule XXVII of this court. Because of the nature of the issues decided in the instant case, I believe it desirable to comment briefly upon them.

Since it is evident that basically the court and the board of commissioners treat this as a case of solicitation, the following comments may not be inappropriate.

Although the solicitation of law business does not import venality, criminality, fraudulent practices or moral turpitude, it is inimical to the good reputation

of the bar. Solicitation within the meaning of Canon 27 can not be precisely defined in such a way as to apply in every case.

Courts surely are not expected to be ignorant of things that other men well know. Everyone knows that attorneys, for their practice, depend upon friends, clients and former clients, and their activities within the community. Friends, acquaintances, and associates of an attorney have the unquestioned right to praise his legal abilities and to divert to him such clients as they can persuade in a legitimate way to engage his services.

This respondent has pursued the personal injury practice of law successfully and aggressively. We would be naive to say that his enterprise has not occasionally carried him into areas where his activity is subject to criticism. In fact, the record clearly shows that in 1957 he was reprimanded by the Common Pleas Court for unprofessional conduct in soliciting professional employment by and through authorized agents and employees.

Charges No. 8 and No. 9 relate to instances where respondent advanced money to certain clients. Respondent admits that such advances were made but justifies them on the ground that they were made as acts of kindness at a time when these clients were in necessitous circumstances.

Clearly, the existence of an attorney-client relationship does not *ipso facto* make a loan from a lawyer to his client against public policy or contrary to the Canons of Professional Ethics. Canon 42 expressly recognizes that a lawyer may in good faith advance expenses of litigation as a matter of convenience but subject to reimbursement. Perhaps an occasional ad-

vance or loan by a lawyer to his client is not proscribed. At best it is a practice which should be followed infrequently and used with extreme caution because it has long been questioned by the courts and the organized bar. It may well be that the advances made by respondent were of such amounts and frequency, and without a sufficiently clear obligation on the part of the clients to reimburse respondent regardless of recovery, that the finding that respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27 is proper.

In charge No. 13, the respondent is accused of conspiring with Michael Orlando and paying Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad, which was Orlando's employer. The evidence shows that Orlando worked for the railroad from 11:00 p.m. to 7:00 a.m., five days a week, and that the daystime was his own without restriction. There is nothing unethical in the employment of an investigator. It can not be inferred from such employment that the attorney is "ambulance chasing." In fact the board did not find that Orlando had been soliciting claims for respondent. It found instead that respondent was guilty of misconduct because he was a party to a transaction which caused Orlando to breach his duty of loyalty to his employer.

The principle that "an agent can not serve two masters" is well established. Certainly an attorney may not ordinarily represent principals with conflicting interests, *e.g.*, vendor and vendee of property. But here the respondent was a principal or master and not the agent or servant. It would appear that the penalty, if any, for a transgression of the principal should be borne by the agent, Orlando. I fail to find any provi-

sion in Canon 29 or Canon 32 which would require that a sanction be applied against the respondent, who merely made it possible for Orlando to attempt to serve "possible" conflicting interests.

HERBERT, J., dissenting. I am unable to join in the judgment entered in this cause, basically, for two reasons: (1) the judgment in substance overrules long recognized and established principles of law in Ohio, to wit, *Roberts* v. *Montgomery,* 115 Ohio St., 502; *Scheinesohn* v. *Lemonek,* 84 Ohio St., 424; *Cleveland Ry. Co.* v. *Godfrey,* 28 O. L. R., 466; and *Reece* v. *Kyle,* 49 Ohio St., 475; and (2) a recent decision of the Supreme Court of the United States, being *Brotherhood of Railroad Trainmen* v. *Virginia, ex rel. Virginia State Bar* (April 20, 1964), , 84 S. Ct., 1113.

The *per curiam* overrules *Reece* v. *Kyle,* 49 Ohio St., 475. In that case, Spear, C. J., delivered a scholarly opinion of a unanimous court upon the obstacles that have confronted courts for hundreds of years in Anglo-Saxon judicial history. He pointed out the efforts to throttle the vicious practices of champerty and maintenance but also emphasized the ever-present duty of the courts to protect the weak and dependent from oppression by the powerful. While commenting upon rules necessary to control evils of the past, he warned, in the opinion, at page 487:

> "* * * new conditions arisen by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in the courts."

In the case at bar, respondent, over a period of years, and with a large clientele according to the relator, gave financial aid to three or four needy clients. The importance of financial aid from his lawyer to an injured

workman may spell the difference between injustice and justice.

For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the dependents, through a fiduciary, contract with a lawyer to represent them in negotiations for settlement or in litigation.

The railroad offers a meager totally inadequate settlement—a small percentage of what a lawful judgment could reasonably be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimant.

Under the pronouncement in the case at bar, lawyers in Ohio are not permitted to give or loan financial assistance to a client even though the injured employee or the dependents in case of death are in want and hungry.

People, ex rel. Chicago Bar Association, v. *McCallum,* 341 Ill., 578, 173 N.E., 827, is a case squarely in point.

There, the facts recited in the opinion are amazing. It is well worth reading. The second paragraph of the syllabus states the law of the case in this language:

> "*Advancing money to indigent client is not against public policy.* The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of a personal injury case and while he is unable to earn anything, may, in a sense, tend to foment litigation by preventing *an unjust settlement from*

necessity, but there is no authority holding that it against public policy and no reason why it should be so considered, *as a man in indigent circumstances thereby may obtain justice where without such aid he would be unable to do so.*" (Emphasis added.)

Under the holding in the case at bar, the doctrine of the *McCallum case* cannot be followed in Ohio.

Charge 13 and the facts in support thereof are quite simple. One Orlando was a yard employee of the Baltimore & Ohio Railroad. He released the "air" of incoming trains. He had a regular tour of duty. He performed his duties faithfully and well. He was loyal to his employer in his employment. Respondent employed Orlando during some of his off-duty hours and on his own time to interview witnesses and discover the facts and circumstances surrounding episodes wherein clients of the respondent were injured while in the performance of their railroad duties or were killed by reason of the negligence of the employing railroad.

To establish negligence of a railroad causing such an injury or death, witnesses, who thoroughly understand the intricate and complex construction and operation of railroad mechanical devices and equipment, are essential. Such information and such witnesses are necessary to establish a case, for an injured workman or for the dependents of one killed, by testimony by those familiar with railroading and the operation of trains.

Orlando's employment was not in violation of law. It was thoroughly consistent with enactments of Congress, particularly Section 60, Title 45, U. S. Code, referred to in the *per curiam* opinion. This law intended to make available information to injured em-

ployees and persons in interest. Without the aid of Orlando or some other well-informed person, the respondent would not have the names of necessary witnesses and would be handicapped severely in the presentation of a case of an injured railroad workman or the dependents of one killed by reason of the railroad's negligence. By his extra work, Orlando helped the injured and the dependents of the dead to secure justice. The *per curiam* says that Orlando was disloyal to his railroad employer, and that respondent was unworthy of being a lawyer because he used witnesses and information secured by Orlando. The respondent was acting under a law enacted by the United States Congress above mentioned and in furtherance of the administration of justice.

Respondent furnished records to the Internal Revenue Service to show his payments to Orlando in order to deduct the same from his own income tax. It seems to me that records that satisfy the Internal Revenue Service were all that respondent was required to keep. It is said that Orlando was disloyal to his railroad employer by furnishing information and evidence that would compel his employer to respond to the requirements of justice. Orlando was acting in pursuance to and in accordance with a congressional enactment. He was at the same time giving an invaluable service to injured railroad workmen and the dependents of the dead who were represented by the respondent.

> "A state could not, by invoking the power to regulate the professional conduct of attorneys, *infringe in any way* the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." (Emphasis added.) *Brotherhood of Rail-*

road Trainmen v. *Virginia, ex rel. Virginia State Bar, supra.*

Charge number 13 against the respondent, and the facts offered to substantiate it, appear to me to be clearly contrary to the above-quoted principle of law.

JUDGMENT

This cause came on to be heard upon the Objections by respondent to the Final Report of the Board of Commissioners on Grievances and Discipline and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the Final Report of the Board of Commissioners on Grievances and Discipline be, and the same hereby is, modified to reduce the discipline recommended by the Board of Commissioners to an indefinite suspension.

It is further ordered and adjudged that the Final Report of the Board of Commissioners on Grievances and Discipline, as modified, be, and the same hereby is, confirmed and the respondent John Ruffalo, Jr., is indefinitely suspended from the practice of law.

The respondent, John Ruffalo, Jr., is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges

and prerogatives customarily accorded to members in good standing of the legal profession of Ohio.

It is further ordered that the respondent, John Ruffalo, Jr., surrender his certificate of admission to practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, John Ruffalo, Jr., pay the costs of these proceedings taxed in the amount of One Thousand Six Hundred and Eighty-eight dollars and Ninety-four cents ($1,688.94).

It is further ordered that copies of this Entry be certified to the Respondent, to all counsel of record, to the Board of Commissioners on Grievances and Discipline, to the Mahoning County Bar Association, to the Presiding Judge of the Federal District Court at Cleveland, Ohio and to the Presiding Judge of the Court of Common Pleas for Mahoning County.

Approved: Kingsley Taft, Chief Justice.

APPENDIX B

HOW THE FEDERAL QUESTIONS WERE RAISED

As set forth in the Statement of the Case, the federal claim with regard to charge 13 was expressly rejected by the Supreme Court of Ohio, and the details as to how it was raised need not be reproduced here. Rule XXVII(37) of the Supreme Court of Ohio calls for procedure to be "as summary as reasonably may be." It makes no provision for raising legal objections before the hearing panel or the Board of Commissioners, and permits amendments to any answer or objection "at any time prior to final order of the Court." By agreement of the parties and the hearing panel, legal objections were not stated to the panel, and it was agreed that all such objections might be raised in the brief (Tr. 1021-1022). Accordingly the briefs, although not ordinarily a part of a record in this Court for this purpose, may here be considered.

The following excerpt is taken from the discussion of charge 8, at pp. 24-25 of the brief for the present petitioner filed with the hearing panel and the board: "Indeed, the most compelling and ethical reason *for* the advancement of such moneys is to prevent or at least alleviate hardships from destruction of earning power due to injuries or death of the family breadwinner. This is especially true in cases arising under the Federal Employers' Liability Act where the injury or death usually strikes the family breadwinner and where compensation is dependent upon either a successful action in a court before a jury or a voluntary settlement with the employer, the railroad. Advancements so made *after* the attorney-client relationship

has been established *do not and cannot stir up litigation.* The right and the claim is established by law and has already been asserted and the attorney retained. On the contrary, such rights and claims established by law may well be minimized or thwarted altogether if such advancements are not made so that the client or family can survive until the time of trial. To punish a lawyer for making such advancements on some allegedly ethical grounds is the same as stating that under the Federal Employers' Liability Act the employee's right to trial in a court of law must be denied unless he has the means of obtaining the money to carry himself until the date of trial."

The same objection was renewed in identical terms at pp. 35-36 of the Objections to Report of the Board of Commissioners on Grievances and Discipline, filed with the Supreme Court of Ohio. The following excerpts are also taken from those Objections. At pages 1-2: "2. The proceedings herein are in violation of Article I, Section 1 and 16, of the Constitution of Ohio and of the Fourteenth Amendment of the United States Constitution in that the State of Ohio through the proceedings herein has abridged the privileges and immunities of Respondent, a citizen of the United States and of this State, and has deprived Respondent of the pursuit of his livelihood and happiness without due process or due course of law, and have denied to Respondent the equal protection of the law accorded to other citizens." At page 4: "19. The conclusions and the recommendation of the Board were unconstitutional, unlawful, arbitrary and unreasonable." At pages 11-13: "Assuming as this Court has held that it does have constitutional power and authority to pass rules and laws and to set up exclusive procedures with respect to the practice and discipline of attorneys, we

submit that both the Ohio Constitution and the Fourteenth Amendment to the United States Constitution require certain procedural and substantive safeguards and rules to be applied, whether the proceeding be called a hearing, a trial or whatever. Certainly equal protection under the law and due process and due course of law imply that one who is to be deprived of a valuable right by an adverse finding or decision (whether he be an attorney at law with his livelihood at stake or a corporation with mere loss of money at stake) is entitled to the fundamental rules and safeguards to which any other citizen is entitled under like circumstances. By that we mean that Respondent in any event cannot be constitutionally stripped of his license to practice law unless the proceedings, whether under this Court's rules or in a court at law, are *conducted and decided* under the rules of law and under fundamental rules of procedure. He is entitled certainly to be served with, advised of and tried after reasonable notice under written and concise charges and no others. * * * We submit, in short, that the Respondent cannot be constitutionally stripped of his license to practice law if entirely different procedural rules and substantive laws are applied to him than those applied to other citizens in defending much less serious claims or charges."

The following excerpts are from pages 1-3 of the Application for Rehearing filed with the Supreme Court of Ohio:

> "1. The holding that loans by respondent, an Ohio attorney, to clients with claims under the Federal Employers' Liability Act (Title 45, U.S.C., Sections 51. et seq.) made and accepted, according to this Court's finding, to enable such clients or their families to survive pending liti-

gation under that Act amount to the purchase of an interest within the meaning of Canon 10 of the Canons of Professional Ethics and are, therefore, unethical and forbidden is an unconstitutional infringement of the rights of such clients to be fully and fairly represented in lawsuits authorized by Congress under that Act to effectuate a basic public interest and is an unconstitutional infringement of respondent's representation of such clients as an attorney at law, and, is, moreover, an undue and retroactive impairment of and restraint of the rights to contract and to acquire, possess or protect property rights; and that holding is contrary to and in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution, and of Article I, Sections 1, 2, and 16 and Article II, Section 28, of the Ohio Constitution.

"2. The holding that loans by respondent, an attorney, to clients with claims for personal injuries or wrongful death under the Federal Employers' Act (Title 45, U.S.C., Sections 51, et seq.), made and accepted, according to this Court's finding, to enable such clients or their families to survive pending litigation are unethical and forbidden upon the ground that the attorney has no 'reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim' is an unconstitutional discrimination by the State of Ohio against all litigants with claims under that Federal Act who are without funds or means of security for loans and against the attorney representing such litigants, with the result that the rights of such indigent claimants and their families under lawsuits authorized by the Congress of United States have been and will be seriously and substantially infringed and impaired and the representation of such indigent clients by respondent as an attorney at law has been and will be likewise infringed and impaired; and said holding is in violation of the First, Fifth and

Fourteenth Amendments of the United States Constitution and of Article I, Sections 1, 2 and 16 of the Ohio Constitution.

"3. This Court's declared inherent power to regulate attorneys of Ohio cannot be constitutionally invoked to forbid such loans and to infringe constitutional rights as set forth in the first two paragraphs in support of this application, particularly where as in this proceeding: (a) the loans were made after the attorney-client relationship was established to effectuate a claim or claims authorized by Acts of Congress; (b) there was an agreement in each case to repay the loans irrespective of the outcome of the litigation; (c) such loans so made and so agreed to be repaid were not contrary to public policy of this state and indeed were in conformity with the previously declared *law* of this state, statutory and judicial; and (d) such loans were and are not contrary to the policy of the federal law authorizing the claims and indeed were and are necessary in order to obtain full vindication of the claimants' rights under that law in view of the state of the trial dockets in many courts causing delays beyond the control of either the claimants or their attorneys."